

¶ 1 *Held:* The trial court properly denied defendants’ section 2-619 motion to dismiss the forcible entry and detainer complaint based on an allegation that landlord’s acceptance of rent negated the landlord’s 30-day notice to terminate a month-to-month tenancy. Additionally, the trial court properly denied defendants’ claim for specific performance of a contract to purchase the real estate that expired three years before the eviction proceedings.

¶ 2 Plaintiff Z & S Corporation (Z & S Corp.) filed a motion for forcible entry and detainer after defendants Fill and Fly, Inc. (Fill & Fly) and Charanjeet Singh, a/k/a Chaney Singh, the

operator of the Fill and Fly, and other parties in possession refused to vacate two properties (the properties) owned by plaintiff following service of a notice to terminate the month-to-month tenancy. After the trial court denied defendants' motion to dismiss the forcible entry and detainer action pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2012)), defendants filed an amended counterclaim requesting the court to enforce a December 2009 agreement between the parties allowing defendants to purchase both properties. The trial court denied the first amended counterclaim for specific performance and granted plaintiff possession of the properties.

¶ 3 On appeal, defendants first claim the court erred when it denied their section 2-619 motion to dismiss. Second, defendants argue the decision to deny the counterclaim for specific performance constituted an abuse of discretion. We affirm.

¶ 4 BACKGROUND

¶ 5 On June 14, 2012, plaintiff filed a "Complaint for Forcible Entry and Detainer/Possession" seeking physical possession of properties it owned at 2420 24th Street and 2400 7th Avenue in Rock Island, Illinois, subject to a mortgage with American Enterprise Bank (the Bank). According to this complaint, plaintiff entered into an verbal, month-to-month lease with defendant Fill & Fly, effective February 1, 2008. The terms of the month-to-month lease allowed defendants to remain in possession of each location by making a monthly payment equal to plaintiff's monthly principal and interest on the existing mortgage for the properties, plus real estate taxes. In addition, defendants agreed to pay the Illinois sales taxes on the convenience store purchases and maintain property and casualty insurance on the properties. The complaint alleged in spite of receiving plaintiff's 30-day Notice of Termination of Tenancy on February 28,

2012, which indicated the tenancy would end on March 31, 2012, defendants failed to vacate the premises by that date and also failed to pay the real estate taxes during their tenancy.

¶ 6 Defendants filed a section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2012)) the complaint for forcible entry and detainer on June 21, 2012, claiming an affirmative matter barred recovery. Specifically, defendants alleged the landlord continued to accept Fill and Fly's monthly payments after the March 31, 2012, deadline which negated the 30-day notice to terminate the month-to-month tenancy. Consequently, defendants believed they were entitled to retain possession of the property until they were served with another notice to terminate the month-to-month tenancy.

¶ 7 In response, plaintiff asserted, among other things, due to ongoing settlement negotiations the acceptance of rent did not terminate the original 30-day notice to terminate the month-to-month tenancy. Plaintiff's pleading included an attached letter dated March 31, 2012, from plaintiff's counsel agreeing to a two-week extension of the notice to terminate, to April 14, 2012, due to settlement negotiations aimed at reaching an agreement for the sale of each location to defendants. Plaintiff also attached a facsimile dated June 4, 2012, indicating plaintiff was interested in selling the properties to defendants for \$1.406 million.

¶ 8 Based on the pleadings, the court denied defendants' section 2-619 motion to dismiss after a hearing conducted on July 11, 2012. The court noted the forcible entry proceeding involved a 30-day notice to terminate a month-to-month lease and found "the fact that the defendant continued to make payments [was] certainly interesting, but [it did] not believe it [was an] affirmative matter to justify the dismissing of this complaint."

¶ 9 Defendants filed a first amended counterclaim on September 27, 2012, requesting the

court to enforce a December 2009 agreement between the parties allowing defendants to purchase both properties. On January 10, 2013, the court conducted a bench trial on the merits of plaintiff's complaint for forcible entry and detainer and defendants' first amended counterclaim for specific performance

¶ 10 During this trial, plaintiff called defendant Charanjeet Singh as an adverse witness who testified he operated gas stations and convenience stores on plaintiff's properties since February 18, 2008. When he began operating the stations, he had an oral agreement to pay the monthly mortgage obligations to the Bank, maintain insurance on the properties, and maintain and clean the properties in exchange for possession of the premises.

¶ 11 Singh testified the parties worked through a "middle man" named Charmpal Guhman. Singh stated he paid \$100,000 to Guhman as a down payment to purchase both properties but was not going to pay the property taxes until he "took over," at which point he would "have to pay – start paying property tax." Singh also acknowledged, however, that "starting in 2009 [he] agreed to pay all the property taxes" but he had not done so through the November 2012 installment. Singh further agreed he was "holding off on paying [the property] taxes until a new agreement could be entered" with plaintiff regarding the properties. Singh testified his former attorney drafted the December 2009 offer to purchase. Singh stated the closing did not take place, as agreed, before December 31, 2009.

¶ 12 According to Singh, he remained in possession of the properties and continued to operate both businesses after December 31, 2009; thus, although the sale did not take place, Singh remained in possession. On February 28, 2012, Singh received the notice of termination of tenancy. After receiving the eviction notice, he continued to make the rental payments to the

Bank, even though he knew plaintiff wanted possession of the properties after March 31, 2012.

¶ 13 Singh acknowledged his current counsel made an offer to plaintiff on his behalf on April 24, 2012, to purchase both properties for \$1.275 million. This offer was not accepted. As evidence of the ongoing negotiations, the court admitted a written offer dated April 24, 2012, as an exhibit. According to Singh, since he was unable to reach a new agreement to purchase the properties, he “want[ed] to now go back to the original offer from December of 2009 and simply pay the amount of the loan that [was] due to American Enterprise Bank[.]” .

¶ 14 Mohammed Ali testified he was an owner and principal of Z & S Corp. He stated Z & S Corp. purchased the properties from Guhman in September 2007 and Guhman acted as a “middle man” when defendants took over the operation of the businesses in February 2008.

¶ 15 Ali testified that, under the terms of the 2009 verbal agreement, defendants agreed to pay the monthly mortgage amount on the properties directly to Colson Service Corp. (Colson), who “work[s] for” the Bank, agreed to “take care of the property taxes[.]” and agreed to insure and maintain both properties. Ali acknowledged Singh made a cash payment to him of \$30,000 or \$40,000 as an inducement for Ali to sign and accept the December 2009 offer to purchase. Ali also stated this cash payment reimbursed Ali for inventory on the properties when Singh took over the businesses in February 2008. Ali testified defendants did not pay the sales taxes, the property taxes, or pay for the inventory in the stores since Singh took over. Ali acknowledged Singh maintained the properties by fixing the parking lots, coloring the canopy, and putting up a sign.

¶ 16 Ali testified that his “plan was to sell the property merely for the assumption of the loan balance[.]” The deal did not close by December 31, 2009, Singh did not assume the loans, and

the parties continued to operate under their verbal lease agreement. Ali denied agreeing to postpone the closing date for the 2009 offer. After plaintiff served the eviction notice in 2012, Ali and Singh attempted, but were unable, to reach a new agreement regarding the sale of the properties. Ali stated he did not intend to permit defendants to continue to operate the properties under the month-to-month lease while he “accept[ed] or allow[ed]” the mortgage payments after service of the notice of termination.

¶ 17 Singh testified on his own behalf. According to Singh, he had an oral agreement with Guhman in 2008 to purchase the stations from him for \$1,050,000. Singh testified he paid Guhman \$100,000 as a down payment and made the monthly payments toward the rent to Guhman for the first year and a half. Singh stated he and Guhman agreed these monthly payments would apply towards the purchase price. However, at some time in 2009, Ali and Guhman had a falling out and Guhman “disappeared.” At that point, Singh begin making the monthly mortgage payments to Colson.

¶ 18 Singh stated he paid \$50,000 in cash to Ali at the time they signed the December 2009 offer to purchase. The parties did not close on the offer to purchase by December 31, 2009, because Ali did not pay the property taxes with the money Singh provided him. The Bank wanted the property taxes “clear” before it started his application process and Singh could not complete the purchase because plaintiff would not pay off the property taxes.

¶ 19 Singh explained that in order to complete the financing with the Bank, he needed a green card, which he obtained three months prior to the 2013 trial date. He further agreed he could not have qualified for a loan from the bank until his had his green card, but explained his wife could have applied for the loan since she became part of his business once they married in 2009.

¶ 20 Singh acknowledged he “and Ali ha[d] talked [at] various times throughout this whole process,” but they could not agree on a sales price or resolution involving the properties. Singh testified that the night before the trial, the parties spoke about selling the properties for the amounts due on the mortgages plus \$150,000 cash to plaintiff.

¶ 21 Following the evidence and argument of counsel, the court found the parties originally entered into a month-to-month tenancy. The court found plaintiff served a proper 30-day notice to terminate the tenancy in 2012. The court further stated “clearly based on the evidence the plaintiff has established the entitlement to an order of possession based on a month-to-month tenancy.”

¶ 22 Regarding defendants’ counterclaim for specific performance, the court noted defendants sought to enforce an offer that expired three years before the time of the trial in order to maintain possession of plaintiff’s property. The court further stated the preponderance of the evidence did not indicate defendants could have performed the agreement in 2009 and thus, specific performance was not in order.

¶ 23 The court thus granted possession of the properties to plaintiff and ordered defendants to vacate the properties by 11:59 p.m. on April 30, 2013, but ordered defendants to continue to make the monthly payments until the date to vacate. The court entered a corresponding written order on January 23, 2013. On February 7, 2013, plaintiff filed a motion to shorten the date of possession, alleging defendants did not make a rental payment, on one of the properties, as ordered.

¶ 24 On April 16, 2013, the court conducted a hearing on the motion to shorten the date of possession and denied plaintiff’s request. Defendants filed a notice of appeal on April 17, 2013,

and a motion for stay of judgment in the trial court pending the appeal. The trial court entered a subsequent order on April 24, 2013, staying enforcement of the January 23, 2013 order pending the appeal.

¶ 25

ANALYSIS

¶ 26

I. Section 2-619 Motion to Dismiss

¶ 27 On appeal, defendants first contend the trial court erred when it denied their section 2-619 pretrial motion to dismiss the complaint on the grounds that the acceptance of rent following the notice of termination of tenancy created a new month-to-month tenancy and negated the 30-day notice to terminate. Plaintiff responds that the acceptance of rent did not operate as a waiver of the notice to terminate due to ongoing negotiations between the parties. Consequently, plaintiff submits the trial court properly denied defendants' section 2-619 motion to dismiss and ultimately, properly granted possession of the properties following a trial on the merits.

¶ 28 A section 2-619 motion to dismiss admits as true all well-plead facts, as well as all reasonable inferences that flow from these facts. *Cooney v. Rossiter*, 2012 IL 113227, at ¶ 17. We review *de novo* a trial court's ruling on a section 2-619 motion to dismiss in the absence of an evidentiary hearing. *Id.*

¶ 29 For purposes of deciding the merits of the 2-619 motion to dismiss, we take as true all well-plead allegations in the motion. Thus, we accept defendants' assertion that they paid rent to Colson during the months of April, May and June 2012 as true.

¶ 30 Under most circumstances, a landlord's acceptance of rent after the termination date provided in the notice of termination of the tenancy constitutes waiver of the notice to terminate. *Bismark Hotel Co. v. Sutherland*, 92 Ill. App. 3d 167, 173 (1980). However, the case law

provides that if the parties are engaged in continued negotiations during which time the tenant pays rent, the negotiations negate the possibility that the landlord has agreed to continue the tenancy. See *Yarc v. American Hospital Supply Corp.*, 17 Ill. App. 3d 667, 671 (1974).

¶ 31 Based on the pleadings, it is undisputed that after service of the 30-day notice of termination in 2012, both parties attempted to reach an agreement for a potential sale of the properties to defendants. Specifically, plaintiff's response to defendants' motion to dismiss indicated the parties engaged in negotiations in March 2012 and June 2012. Eventually, in spite of good faith efforts, a settlement was unsuccessful and the parties could not agree on mutually acceptable terms for a sale of the real estate to occur in 2012. Therefore, based on the pleadings, the parties were engaged in ongoing negotiations during the point in time when the payments of rent occurred in April, May, and June of 2012.

¶ 32 Due to the undisputed fact of ongoing negotiations, we conclude the acceptance of rent did not invalidate the 30 day notice of termination of tenancy. As a result, the trial court did not err when it denied defendants' section 2-619 motion to dismiss the complaint for forcible entry and detainer.

¶ 33 **II. Specific Performance**

¶ 34 Defendants next contend the trial court abused its discretion when it denied their request for specific performance of the 2009 offer to purchase. Arguably, had the court enforced the 2009 offer to purchase, defendants could have avoided eviction by retaining possession pending the completion of this sale according to the terms of the 2009 agreement.

¶ 35 Plaintiff asserts that defendants were not ready, willing and able to complete the terms of the contract before its expiration in 2009. Consequently, plaintiff claims the trial court's ruling

denying specific enforcement did not constitute an abuse of discretion.

¶ 36 The determination of whether to grant specific performance rests within the sound discretion of the trial court, and a trial court's decision will not be overturned absent an abuse of this discretion. *Omni Partners v. Down*, 246 Ill. App. 3d 57, 62 (1993). A court may grant specific performance in a case where the moving party shows it has complied with all of the terms of the contract or that it was ready, willing, and able to complete all of the contractual terms but was prevented from doing so by the other party. *Maywood Proviso State Bank v. York State Bank and Trust Co.*, 252 Ill. App. 3d 164, 171 (1993).

¶ 37 Before a party may compel specific performance of a contract, the party itself must establish that it "has performed [the contract] in all its parts." *Beesley Realty and Mortgage Co. v. Busalachi*, 28 Ill. 2d 162, 165 (1963). If a party cannot make such a showing, it must otherwise establish the other party to the contract prevented them from fulfilling its contractual duties. *Id.*

¶ 38 In this case, defendant seeks specific performance of the 2009 offer to purchase. During his testimony, Singh acknowledged that sometime in 2009 he agreed to pay the property taxes. Singh also agreed, however, he was "holding off on paying [the property] taxes until a new agreement could be entered[.]" From the record, it is evident the nonpayment of real estate taxes caused the Bank to refuse to allow Singh to assume plaintiff's existing mortgage on the properties.

¶ 39 With respect to the Bank's refusal to transfer the loans to Singh due to the lack of a green card, Singh testified his wife could have obtained financing on his behalf. However, the 2009 purchase agreement did not identify Singh's wife as a party to the agreement. The record also

does not disclose any evidence indicating Singh's wife was otherwise in a position to secure this financing before December 31, 2009, on behalf of Fill and Fly.

¶ 40 Based on this record, we conclude the trial court properly found defendants were not ready, willing and able to complete the terms of the contract as of the December 31, 2009, closing date. Therefore, we conclude that the trial court did not abuse its discretion when it denied defendants' counterclaim for specific performance of the 2009 offer to purchase.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 43 Affirmed.